IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2207 OF 2004

IN

SUIT NO. 2232 OF 2004

M/s. Raja Construction Co. ..Plaintiff

versus

J. M. Bhargava & Ors. ..Defendants

Mr. Janak Dwarkadas with Paresh Shah i/b. M/s. Shah & Sanghavi for the Plaintiff.

Mr. Biren Saraf i/b. Sheela Mistry for the Defendant No.1.

Mr. Shyam Mehta i/b. D. Maneklal & Co. for the Defendant No.3.

Ms. Mita Mandhyan i/b. S. M. Associates for Defendant Nos. 4 to 15.

Mr. O.A. Siddique for Defendant No. 16.

CORAM : D. G. DESHPANDE,J.

DATE : 7H DECEMBER,2004.

P.C. :

1. Heard learned counsel for the plaintiff, Defendant No. 1, Defendant No.3, Defendant Nos. 4 to 15 and Defendant No. 16.

2. Plaintiff is a builder to whom defendant No. 4 society gave right to redevelop the property. There are 17 members of the defendant No.4 society. Out of which 15 members have already been moved out or are allotted alternate accommodation by the plaintiff - builder, but despite that defendant Nos. 1 and 3 alone who are refusing to go out, are opposing this Notice of Motion on different grounds.

3. Counsel for the plaintiff contended that plaintiff builder got right to develop the property after deliberations by the society and after taking all the necessary steps by the defendant no.4 society in that regard. There were Annual General Meetings or Extra Ordinary General Meetings of the society on 1.9.2001, 11.5.2001, 29.5.2001, 21.9.2001, 20.11.2002, 22.3.2003 and 31.1.2003. For all the meetings the defendant no.4 society had given notice to all its 17 members including defendant Nos. 1 and 3. In some of the meetings defendant Nos. 1 and 3 participated. The matter to be discussed in these meetings were earlier circulated and then necessary resolutions were passed in those meetings which ultimately culminated into resolution dated 22.3.2003 in which the society defendant No.4 agreed to enter into the Agreement of Development with the plaintiff. The counsel for the

Plaintiff contended that after the said agreement, the plaintiff has approached and contacted 15 occupants of the said building who are members of defendant no.4 society, they have agreed to vacate or they are in process of vacating, some of them have shifted to their own accommodation and some have been shifted by the plaintiff to alternate accommodation but defendant Nos. 1 and 3 alone in defiance of the resolutions of the society refusing to remove themselves from the respective flats and creating obstacles and hindrances in the project of the plaintiff. It was also contended that all the resolutions, in the aforesaid meeting concerning the development project were either passed by majority or unanimously and in the meeting dated 22.3.2003 in which society - defendant No.4 agreed to entrust the work to the plaintiff, defendant Nos. 1 and 3 deliberately remained absent and now they cannot be permitted to agitate or oppose unanimous resolution of the society.

4. Counsel of the society - defendant nos.4 - 15 i.e. society and other members contended that the obstructions caused by the defendant Nos. 1 and 3 are causing great inconvenience to the other remaining 15 member because they have already opted for alternate accommodation and it was contended that because of the illegal and improper

obstructions of the defendant Nos. 1 and 3 the society is suffering because the plaintiff is unable to carry out the work under the agreement.

5. This notice of motion was however strongly opposed by the defendant Nos. 1 and 3. Firstly it was contended by Mr. Saraf counsel for defendant No.1 that this court has no jurisdiction to entertain and try the suit and grant any reliefs. He contended that when the plaintiff was doing the work of development for the society, the plaintiff was an agent of the society and therefore if an agent has any grievance against any member of the society then he has to file dispute Under Section 91 of the Maharashtra Cooperative Societies Act and therefore the suit is not maintainable. Mr. Saraf also contended, and he was supported by Mr. Mehta for defendant No.3 that as members of the society - defendant No.4, defendant Nos. 1 and 3 have a right to occupy their flat and they cannot be ousted high handedly, without their consent except by due process of law. It was also contended on behalf of these defendants that they were opposing not the development of the building, but they were opposing induction of the plaintiff as builder because according to them the plaintiff does not have good track record. It was also contended by them that the resolutions passed by the society were not

unanimous and therefore they were not binding. Counsel for the defendant no.3 contended that in the IOD issued by the BMC it was a condition that consent of each and every member is obtained by the plaintiff. They also contended that there was no privity of contract between the plaintiff, defendant Nos. 1 and 3.

6. I do not find any force in any of the submissions made by the counsel for the defendant Nos. 1 and 3. Work of development was entrusted to the plaintiff by the defendant No.4 - society after due deliberations and after making all the members aware what the society is going to do or wants to do. The consensus of the members was obtained and the notices of the meetings were given to all the members. It was open for the defendant Nos. 1 and 3 to oppose but they remained absent in the crucial meetings for the reasons best known to them.

7. Consensus of the majority members decide the working and functioning of the society. However every member has a right to putforth his views and either to oppose or approve any motion or resolution but once a decision is taken by the majority then the other members must submit themselves to the resolutions passed. If of course resolution is high handed or it is depriving the member of his

fundamental rights and it is against the good conscience, then the members may oppose the resolution and take necessary steps to make resolution ineffective. But when the defendant No.4 - society held all the aforesaid meetings, inviting all its members to attend the meeting, pass resolutions from time to time right from the stage of considering the feasability of redevelopment, calling for report of the expert, going to see other projects of the plaintiff, put in draft of agreement to be entered with the builder and then enter into agreement with the plaintiff by unanimous vote in the last meeting in which the defendant Nos. 1 and 3 did not choose to remain present, then now the defendant Nos. 1 and 3 cannot frustrate the agreement which the defendant No.4 society entered into with the plaintiff.

8. Further when 15 members of the society have submitted themselves to the resolution and have agreed with the plaintiff to go for alternate accommodation and have vacated their flats or in the process of vacating then two members i.e. defendant Nos. 1 and 3 cannot bring the entire project to a stand still by their frivolous objects.

9. Regarding the preliminary objection regarding jurisdiction raised by Mr. Saraf for the defendant

no.1, there is no need to frame a preliminary issue because when arguments are advanced by the plaintiff for reliefs in the notice of motion then the objection to the jurisdiction can be decided then and there only. According to Mr. Saraf, the plaintiff is as agent of the defendant No.4 and therefore he falls squarely within the ambit of Section 91 of the Maharashtra Cooperative Societies Act. I do not find any substance in the arguments because the work entrusted to the plaintiff is a civil contract for development. The work is entrusted pursuant to resolution passed and agreement entered into, therefore it is a right acquired by the plaintiff to enforce the agreement.

10. The plaintiff is a third party and a private party and they are not at all concerned with the day to day affairs and management of the society - defendant no.4 but they get certain rights on the basis of the agreement entered into by the society with them. Section 91 of the Maharashtra Cooperative Societies Act lays down **that any disputes touching the constitution i.e. elections of the committee or its officers other than elections of committees ..... conduct of general meeting, management or business of the society shall be referred by any of the parties to the society to the Co-operative Court.**

11. My attention was invited by Mr. Saraf to sub section (1)(a) of Section 91, where in it is stated that if both the parties thereto or any of the following are **a society, its committee, any past committee, any past or present officer, any past or present agents.....** " According to Mr. Saraf the plaintiff was an agent of the defendant no.4 and therefore it was incumbent upon them to file a dispute before the Co-operative Court and therefore this court has no jurisdiction. It appears that Mr. Saraf failed to take into consideration the earlier part of sub section (1) of section 91 wherein it lays down that any dispute is touching :

a) constitution,
b) election of the committee,
c) conduct of the general meetings,
d) management or business of the society.

The present dispute is not about the management or the business of the society. Neither it is about election or constitution or conduct of general meeting. The dispute or controversy is about enforcement of the right acquired by the plaintiff by virtue of agreement with the society. Therefore, for these reasons the objection of jurisdiction has

to be rejected and I have rejected the same.

12. It was next contended by defendant Nos. 1 and 3 that there is no privity of contract between them and the plaintiff. This argument is without any substance. If the society has authorised plaintiff by agreement after passing resolution in a general meeting, then there was no necessity of separate and independent agreement between the plaintiff and the defendant Nos. 1 and 3. Defendant Nos. 1 and 3 are members of the society and they are bound by the resolution of the society.

13. It was also contention of the defendant Nos. 1 and 3 that they were opposing not the redevelopment of the building, but opposing the plaintiff because the track record of the plaintiff was not good. In this regard, counsel for the defendant No.4 society contended that before entrusting the work to the plaintiff they had considered the track record, they had visited the sites of the plaintiff and defendant No.3 was also one of the persons visiting the site and after satisfying themselves about the capability and eligibility of the plaintiff to carry out the work, they have given this contract to the plaintiff. If the society after due care and caution has entrusted the work to the plaintiff then now the defendant Nos. 1 and 3 cannot be permitted

to contend that the plaintiff are not entitled to enforce the agreement. This plea of the Counsel for the Defendant No.4 society was supported by the defendant Nos. 5 to 15 that they were satisfied about the capability of the plaintiff and therefore then only they had decided i.e. through society's resolution to entrust the work to the plaintiff. Therefore the wisdom of 15 members has prevailed upon the society and when defendant Nos. 1 and 3 deliberately chosen to remain absent in the crucial meetings, then they cannot now be permitted to thwart the entire project by flimsy and baseless opposition.

14. Counsel for the defendant no.3 also contended that on the date of the filing of the suit Amitabh Narendra Bhatia was not the partner of the plaintiff's firm and therefore in view of the judgment of this Court reported in **AIR 1987 Bombay 384 (Gandhi & Co. vs. Krishna Glass Pvt. Ltd) the** suit should be dismissed or at any rate no ad interim should be granted.

15. As against this counsel for the plaintiff tendered before me a certified copy of the Registrar of Firms wherein the name of Amitabh Narendra Bhatia is taken on record of the Registrar of Firms on 16.9.2004 but in that certificate itself it is

clarified that he has joined the firm on 31.3.2000. In view of this, objection under Section 69 of the Partnership Act raised by the defendant No.3, has no force.

16. For all these reasons, I hold that the plaintiff have succeeded in making out strong prima facie case in their favour. The balance of convenience is not only in favour of the plaintiff but also in favour of 15 members who have already shifted or have agreed to shift or are in the process of shifting, is a consideration in this case. Needless to say that if defendant nos. 1 and 3 are permitted to obstruct the work not only the plaintiff will suffer irreparable loss but other 15 members of the society will suffer irreparable loss because all those 15 members will neither be able to occupy the present building nor they will be able to get the premises in the new building in future.

17. I do not find any merit in the objections raised by the defendant Nos. 1 and 3 and as a result prayers (a) and (b) of the notice of motion are granted.

18. After this order, counsel for the defendant Nos. 1 and 3 prayed for stay of this order. The prayer for stay was strongly opposed not only by the

plaintiff but by the defendant No.4 - 15 i.e. society and other members of defendant No.4 society. They contended that the entire society will suffer irreparable loss, and that the stay will cause grave inconvenience to other 15 members. In view of these submissions, prayer for stay is rejected.

19. All concerned parties to act on an ordinary copy of this order duly authenticated by the Associate of this Court.

7.12.2004 (D.G.DESHPANDE,J.)